Office-Supreme Court, U.S.
FILED
MAY 13 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1415

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEO L. MARTELON, PETITIONER

v.

HERBERT R. TEMPLE, JR.,
DIRECTOR OF THE NATIONAL GUARD BUREAU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioner alleges that his military superiors violated his statutory and constitutional rights in connection with the termination of his employment as a civilian technician in the Colorado Army National Guard.

1. Petitioner sought full-time employment as a civilian administrative supply technician in the Colorado Army National Guard in 1974 and "was informed in writing that his employment was 'contingent upon membership in the Colorado National Guard' " (Pet. App. 2).[1] Petitioner

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[1]National Guard technicians are full-time civilian employees with responsibility for "(1) the administration and training of the National Guard; and (2) the maintenance and repair of supplies issued to the National Guard or the armed forces" (32 U.S.C. 709(a)). The relevant statute provides that, in general, "a [National Guard] technician * * * shall, while so employed, be a member of the National Guard * * *" (32 U.S.C. 709(b)).

enlisted in the Guard on November 1, 1974, and was hired on November 3, 1974, as an administrative supply technician assigned to the 220th Military Police Company. He was responsible for supervising the unit's military materiel. Pet. App. 2, 9. Petitioner's military assignment also was to the 220th Military Police Company.

In June 1981,[2] a new military commander was assigned to the 220th Military Police Company and petitioner was relieved of his military duty as First Sergeant of the unit. He was transferred to the 193rd Military Police Battalion headquarters. Pet. App. 2, 9; Pet. 5. The court of appeals found that "[t]he record amply demonstrates the dissatisfaction of [petitioner's] superiors with [petitioner's] military performance. The record also shows that the dissatisfaction was the cause of [petitioner's] transfer" (Pet. App. 4 (citation omitted)).[3] Petitioner's new military unit did not have an available civilian technician position comparable to petitioner's position with the 220th Military Police Company. The National Guard concluded that petitioner's new military assignment was incompatible with his continued civilian employment as an administrative supply technician because he could not serve as a technician in his new military unit. Petitioner's civilian job therefore was terminated effective August 1, 1981. *Id.* at 2, 9-10; Pet. 5.

Petitioner made several written requests to his military superiors for reversal of his military reassignment, but the requests were not successful. He then filed this lawsuit in the United States District Court for the District of Colorado, alleging that the termination of his employment was not authorized by the statute governing employment of

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[2]The decisions of the courts below erroneously identify the year as 1983.

[3]The 220th Military Police Company suffered substantial losses of equipment during the time petitioner was assigned to the unit (see R. 88-129).

National Guard technicians and that he had been deprived of his right to due process in violation of 42 U.S.C. 1983.[4] Petitioner sought reinstatement, back pay and benefits, compensatory and punitive damages, and attorney's fees and costs.

2. The district court granted summary judgment in favor of respondents (Pet. App. 9-11). It first concluded that the Section 1983 claim raised issues that were not appropriate for judicial determination because "[a] federal trial judge is not competent to review decisions of Army National Guard officers in assigning personnel, at least in the circumstances here presented" (Pet. App. 10). Second, the court found that the Guard acted within its authority by terminating petitioner's civilian employment after petitioner was militarily reassigned to a unit in which he could not serve as a civilian technician.

The court of appeals affirmed (Pet. App. 1-7). The court noted that petitioner did not contest the Guard's right to transfer him to a different military unit (*id.* at 3), and that the termination of petitioner's civilian employment was "clearly related to [his] military employment" because it was a result of his military transfer (*id.* at 4). Relying on this Court's decisions in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), and *Feres* v. *United States*, 340 U.S. 135 (1950), the court of appeals held that petitioner's claim was not cognizable under Section 1983 because that provision does not supply grounds for a suit against superior officers challenging a military decision (Pet. App. 3-5).

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[4]Petitioner also alleged that the reassignment violated his enlistment contract, but he abandoned that issue in the court of appeals (Pet. App. 2) and has not raised the contract claim in this Court.

The court of appeals also concluded that petitioner's termination was authorized by the National Guard Technicians Act of 1968, 32 U.S.C. (& Supp. I) 709, and the regulations promulgated thereunder. The court relied (Pet. App. 6) upon statements in the Act's legislative history indicating that Congress viewed a technician's civilian duties as inseparable from his military obligations. The court of appeals found that petitioner's dismissal was appropriate under 32 U.S.C. 709(e)(1), which requires dismissal when a technician ceases to hold the military grade specified for his position. It agreed with the district court's conclusion that " 'a civilian technician ceases to hold the requisite 'military grade' when he or she is reassigned to a military unit from which the civilian duties cannot be performed.' " Pet. App. 7.

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Therefore, further review by this Court is not warranted.

a. Petitioner's challenge to the termination of his civilian employment is wholly without merit. The National Guard is "an integral part of the first line defenses of the United States," providing operationally ready combat and support units that can be integrated quickly into the regular armed forces in times of crisis. 32 U.S.C. 102; see also *Maryland* v. *United States*, 381 U.S. 41, 46, vacated on other grounds, 382 U.S. 159 (1965). The Guard employs civilian technicians because National Guard members are not on full-time active duty. 32 U.S.C. 709(a); see also *Maryland* v. *United States*, 381 U.S. at 49. These technicians "serve concurrently in three different ways: (*a*) Perform full-time civilian work in their units; (*b*) perform military training and duty in their units; and (*c*) be available to enter active Federal Service at any time their units are called." H.R. Rep. 1823, 90th Cong., 2d Sess. 2 (1968); see also S. Rep. 1446, 90th Cong., 2d Sess. 2 (1968).

In enacting the National Guard Technicians Act of 1968, Congress indicated that "[t]he concept of the full-time civilian technician program is that [the technician's] civilian work will be performed in the same unit in which he holds a mobilization assignment." S. Rep. 1446, *supra*, at 20.[5] The applicable regulations provide that "[t]he concept of the National Guard technician program is that technicians will be militarily assigned to the same unit in which his technician job is located. In other words, a technician will perform his technician duties, his military training duties, and be mobilized to active duty in the same unit." Technician Personnel Reg. 302.7-9 (Mar. 17, 1981).

Petitioner could not satisfy this requirement after his military transfer, and the termination of his civilian employment therefore was mandatory under the applicable statute and regulations. Section 709(e) provides in pertinent part:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—
>
> > (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who * * * ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment * * *.

The courts below correctly concluded that the regulation providing that a technician will perform his civilian work in his military unit establishes a "military grade" requirement

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[5] A technician could not be integrated quickly into his military unit in times of emergency if he were a member of a military unit other than the unit he served in his civilian capacity. Moreover, if the technician were required to leave his civilian unit, that unit would be deprived of one of its key personnel.

within the meaning of this provision. See Pet. App. 5-7, 11. Since petitioner did not satisfy this requirement after his transfer, his removal under Section 709(e)(1) was proper.[6]

Petitioner now asserts (Pet. 15) that his military reassignment was improper because he should have been assigned to a National Guard unit that had an opening for a civilian technician. This claim is flawed for several reasons. First, petitioner did not present this argument in the court below (see Pet. App. 3) and is therefore barred from raising the issue in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Second, petitioner is incorrect on the merits. Nothing in the statute or regulations prohibited the Guard from reassigning petitioner to the 193rd Military Police Battalion. The military considerations underlying assignments obviously cannot be subservient to the needs of civilian technicians.[7] Finally, petitioner's challenge to this military personnel decision would involve an inquiry into military decisionmaking of the type that this Court previously has found to be improper. See *Chappell* v. *Wallace*,

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[6]Regulation 752.2-3 (Aug. 16, 1982), which was promulgated after petitioner's employment was terminated, states that "[w]hen a technician can no longer meet the requirements of the technician position, removal from the position is required." It makes clear that failure to maintain a "compatible military assignment for the technician position occupied" is grounds for removal (*ibid.*).

Petitioner asserts (Pet. 13) that this result conflicts with the definition of "grade" in another portion of Title 32, but Section 709(e) provides that the termination provisions must be read in light of the relevant regulations. The regulation specifying the importance of compatibility in military and civilian assignments renders Section 709(e)(1) applicable to petitioner's situation.

[7]Petitioner relies (Pet. 15) upon a portion of Technician Personnel Reg. 302.7-9 (Mar. 17, 1981) relating to assignment of technicians, but the regulation does not bar reassignments necessary for military reasons.

462 U.S. 296 (1983); *Gilligan* v. *Morgan*, 413 U.S. 1 (1973); *Feres* v. *United States*, 340 U.S. 135 (1950).

b. Petitioner also argues (Pet. 7-12) that the courts below improperly rejected his claim that he was deprived of his constitutional right to due process because he was not afforded a hearing in connection with the termination of his civilian employment. In *Codd* v. *Velger*, 429 U.S. 624 (1977), this Court stated that a failure to provide a hearing constitutes a denial of due process only if the hearing would "serve [a] useful purpose" (*id.* at 627). Since petitioner did not contest the propriety of his military transfer, a hearing is not required to resolve any factual dispute concerning that action. The statutes and regulations mandated the termination of petitioner's civilian employment following his military transfer, and any arguments presented at a hearing concerning the appropriateness of the termination would be wholly irrelevant. Therefore, petitioner's due process claim is fatally flawed because he cannot show "that he was harmed by the denial of a hearing" (*Codd* v. *Velger*, 429 U.S. at 628).

In addition, petitioner's claim is not cognizable under Section 1983 because it would require judicial review of a military personnel decision. In *Chappell* v. *Wallace*, *supra*, this Court cited the "unique relationship between the Government and military personnel" (462 U.S. at 299) in unanimously concluding that military personnel could not bring suit against their superior officers for constitutional violations under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The Court stated that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment" (462 U.S. at 300).

Petitioner's claim raises this very issue. The reason for the termination of his civilian job was a military transfer brought about by dissatisfaction with petitioner's performance of his military duties. Thus, the claim necessarily would involve consideration of the propriety of a military personnel determination, the type of inquiry found improper in *Chappell*. See Pet. App. 3-5.[8]

Petitioner asserts (Pet. 7-9) that there is a conflict among the courts of appeals concerning the applicability of Section 1983 to National Guard technicians' challenges to employment terminations. However, the only other court of appeals to address the validity of such a Section 1983 claim in view of its intrusion into military affairs also has refused to adjudicate the claim. *NeSmith* v. *Fulton*, 615 F.2d 196, 201-203 (5th Cir. 1980); see also *Schultz* v. *Wellman*, 717 F.2d 301, 306 (6th Cir. 1983) (relying upon *NeSmith* in declining to review the plaintiff-technician's challenge to the grounds for his dismissal). The other decisions cited by

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[8]Petitioner attempts (Pet. 9-12) to distinguish the present action from *Chappell* because it arises under Section 1983. However, in *Chappell*, the Court relied upon *Gilligan* v. *Morgan*, *supra*, in which the Court held that a suit under 42 U.S.C. 1983 challenging the training of National Guard personnel could not be maintained because control of that issue was vested in the Legislative and Executive Branches. Moreover, the courts of appeals have recognized that the considerations underlying *Chappell* also apply to actions under the civil rights statutes. See, *e.g.*, *Brown* v. *United States*, 739 F.2d 362, 366-367 (8th Cir. 1984); *Mollnow* v. *Carlton*, 716 F.2d 627, 630-632 (9th Cir. 1983). Petitioner is correct (Pet. 9-12) that the courts of appeals have used slightly different analytic approaches in applying *Chappell* in this context, but the results have been the same — the courts of appeals uniformly have refused to examine military decisions in suits under civil rights statutes.

Petitioner also suggests (Pet. 10-12) that a different rule should apply to his claim for injunctive relief. However, the claim in *Gilligan* v. *Morgan*, *supra*, sought declaratory and injunctive relief and the Court held the action barred on this ground.

petitioner all pre-date *Chappell* and do not concern the propriety of judicial review of military decisions.[9] Petitioner has not cited a single decision rejecting the applicability of *Chappell* in this context.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1985

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[9]This Court's decision in *Tennessee* v. *Dunlap*, 426 U.S. 312 (1976), similarly is inapposite. In that case the Court *rejected* the technician's due process claim. The decision therefore does not provide any support for the due process claim asserted by petitioner.

DOJ-1985-05